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80-1748

IN THE

Supreme Court of the United States

No. _____

RONALD MORELLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

Whether a wholly illegitimate group, which has no existence or purpose other than the commission of the acts which constitute the "pattern of racketeering" alleged in the indictment, is not an "enterprise" within the meaning of 18 U.S.C. §1961(4)?

II

Whether two acts which constitute parts of the same criminal transaction can be considered separate "predicate acts" under 18 U.S.C. §1961(5), and can for that reason, form the "pattern of racketeering activity" required for conviction under the RICO statute?

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I

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ronald Morelli, by and through his attorneys, Neil H. Fink and N.C. Deday LaRene, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming his conviction of one count of misconducting an enterprise through a pattern of racketeering activity or collection of unlawful debt (RICO) in violation of 18 USC §1962(c), of one count of conspiracy in violation of 18 USC §1962(d), and of two counts of wire fraud in violation of 18 USC §1343, filed on February 27, 1981.

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals filed February 27, 1981, affirming Petitioner's conviction, is reprinted in full as Appendix A hereto. That Opinion has not, as of this writing been published.

JURISDICTION

The Opinion and Order appealed from was entered February 27, 1981. The jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides, in part:

> 18 USC §1961
>
> (4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.
>
> (5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;
>
> 18 USC §1962
>
> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States

Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions (a), (b), or(c) of this section.

> Whoever, having devised or intending to devise any scheme artifice to defraud, or for obtaining money or property by false or fraudulent pretenses, representatives, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner, with eight co-defendants, was charged in a ten-count indictment with conducting an enterprise through a pattern of racketeering activity (in violation of the so-called RICO statue, 18 USC §1961 *et seq*), conspiracy to do so, and with eight so-called "predicate acts" alleged violations of Federal law which were said to constitute a portion of the pattern of racketeering activity. On July 13, 1977 a Motion to Dismiss Counts One and Two of the Indictment (the RICO counts) was filed and joined by all co-defendants in which it was argued that the RICO statue did not apply to wholly illegitimate groups. That motion was denied by the trial court on Order issued from the bench prior to trial.

The case went to trial on May 1, 1978, but a mistrial was declared as to Petitioner. He was subsequently tried individually, starting August 24, 1978.

The indictment alleged, essentially, that during a six year period, Petitioner, along with his co-defendants were associated for the purpose of carrying out various schemes, or "scams", to obtain money by deception and finally collect this money, where necessary, by extortion.

The acts of wire fraud of which Petitioner was ultimately convicted were, as well, the predicate acts of

racketeering underlying his RICO conviction. The use of the wire, or interstate communication facility, detailed in Counts 3 and 5 of the Indictment, was incidental to an ongoing scheme to relieve one victim, James Hutton, of substantial amounts of money through various ventures which were not only illegal but fictitious. Hutton was repeatedly persuaded to invest, or "front," money for such non-existent illegal operations as the theft of a liquor truck, and the purchase for distribution of narcotics.

In the latter instance, Morelli and Luca attempted to convince Hutton that he could recoup his previously financial losses by investing money in a narcotics deal. While Hutton hesitated, Morelli and Luca went to Florida, (actually on vacation, although supposedly in pursuit of the narcotics). Luca testified that telephone calls were made to Hutton from Florida, initially seeking his investment, and finally seeking $500-$1000 for expenses. As a result of this conversation, Hutton sent a Western Union telegraphic money order to Luca for $200.00.

The telephone call from Luca to Hutton represents the use of an interstate communication facility charged in Count 3; the money wired as a result of that call represents the use of the wire charged in Count 5.

At the close of the government's case, the Court granted judgement of Acquittal as to Counts 4, 6, 7, 8, 9 and 10. The Motion for Judgement of Acquittal was renewed and again denied; the jury thereafter received Counts 1, 2, 3 and 5 for consideration. Petitioner was convicted on all counts.

REASONS FOR GRANTING THE WRIT

I.

A WHOLLY ILLEGITIMATE GROUP WHICH HAS NO EXISTENCE OR PURPOSE OTHER THAN THE COMMISSION OF THE ACTS WHICH CONSTITUTE THE "PATTERN OF RACKETEERING" ALLEGED IN THE INDICTMENT, IS NOT AN "ENTERPRISE" WITHIN THE MEANING OF 18 USC §1961(4).

The decision below that a group which exists solely for criminal purposes can constitute an "enterprise" within the meaning of 18 USC §1961(4) conflicts with recent decisions of other Courts of Appeals and, in particular, with *United States v. Turkette,* 632 F2d 896 (1st Cir. 1980) presently pending before this Court on certiorari, granted January 26, 1981, _____ US _____; 67 LEd2d 109 (No. 80-808).

As charged in Counts 1 and 2 of the Indictment, Petitioner and eight severed co-defendants were associated in fact, "thereby being persons associated with an enterprise" as defined in 18 USC §1961(4).[1]/ The Indictment describes an "enterprise" which, based on the facts alleged in the Indictment, and the facts proven at trial, is a loose and informal association of persons whose only purpose was the commission of the illegal acts that form the basis of the charges in Counts 1 and 2 — a wholly unlawful combination.

Petitioner contends that the RICO statues, 18 USC §§1961-68 does not authorize the prosecution of individuals for combining together to committ criminal acts where the association is solely for the purpose of engaging in that activity and not related, in any fashion, to the conduct of a legitimate business or organization.

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[1] The statutory provision cited is actually 1964(4). Since this section is non-existent, it is presumed that the citation refers to 1961(4), and that the error is typographical.

The Court of Appeals for the Eighth and First Circuits have squarely held that the prosecution of a group of individuals who have associated in a series of racketeering offenses is beyond the scope and purpose of RICO. *United States v. Anderson,* 626 F2d 1358 (8th Cir. 1980); *United States v. Turkette,* 632 F2d 896 (1st Cir. 1980), *cert granted* _____ US _____; 67 LEd 2nd 109 (1/26/81). The Fourth and Fifth Circuits have held to the contrary. *United States v. Whitehead,* 618 F2d 523 (4th Cir., 1980); *United States v. Diecidue,* 603 F2d 535 (5th Cir., 1979), *cert denied,* 445 US 946 (1980); *United States v. Elliot,* 571 F2d 880 (5th Cir), *cert denied,* 439 US 953 (1978); *United States v. Malatesta,* 583 F2d 748 (5th Cir., 1978) *modified en banc on other grounds,* 590 F2d 1379, *cert denied,* 440 US 962 (1979); *United States v. Morris,* 532 F2d 436 (5th Cir., 1976); See also *United States v. McLaurin,* 557 F2d 1064 (5th Cir., 1977), *cert denied,* 34 US 1020 (1978).

The Second, Seventh and Ninth Circuits have also decided that an association of criminals is prohibited under Section 1962(c) with, however, vigorous dissent. *United States v. Aleman,* 609 F2d 298 (7th Cir., 1979) *cert denied,* 445 US 946 (1980); *United States v. Rone,* 598 F2d 564 (9th Cir., 1979), *cert denied,* 445 US 946, (1980); *United States v. Altese,* 542 F2d 104 (2nd Cir., 1976), *cert denied,* 429 US 1039 (1977).

This Court will apparently resolve the issue in *United States v. Turkette,* No. 80-808. Petitioner urges the Court to grant this Petition and to consolidate this case for argument with *Turkette.*

The instant case presents an especially apt vehicle for resolution of the question presented, and, moreover, well illustrates why the construction of the RICO statute adopted by the Sixth Circuit represents an untoward expansion of the Federal criminal law, based upon a reading of the statute that is unsupported by its plain language, its legislative history, or basic principles of statutory construction.

A.

The Indictment alleged that Petitioner and his co-defendants, were engaged in a series of schemes, having the intention in each "scam" of obtaining money from a "victim" by fraud. These individuals were an entity or a group only to the extent that each participated with other co-defendants, in some fashion, in one or more "scams." The very purpose of the combination, then, was the commission of illegal acts. In turn, the illegal acts themselves are related only to the extent that they shared more or less, common perpetrators, and, were a function of similarly conceived executed schemes.

In effect, the result is to establish the "enterprise" element by showing that the same individuals conceived and executed several schemes; and to prove the "pattern of racketeering" element by showing that several similar schemes were conceived and executed by the same individuals. In plain language, for all practical purposes, the "enterprise" element and the "pattern" element were (therefore necesarily) treated as one and the same. This is always the case when the "enterprise" has no life of its own, independent of the commission of the predicate "acts of racketeering." The inevitable result that this construction has, of reading out of the statute the identity of its several elements is persuasive evidence that the construction is at odds with the proper scope of the statute.

The offenses alleged in Counts 1 and 2 of the indictment are alleged by 18 USC §1962(c) and (d) as follows:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections . . . (c) of this section.

18 USC §1961 is the definitional portion of Title IX. Subsection (4) of that §1961 defines the term "enterprise":

> (4) "Enterprise" includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

Subsection (1) defines "racketeering activity"; Subsection (5) defines a "pattern of racketeering activity" as two acts of racketeering committed within ten years of each other.

Thus, 1962(c) does anticipate that evidence demonstrate an enterprise, and separate distinct from that structure, a pattern of racketeering activity.

> Common sense, not to mention the first principle of statutory construction, leads us to reject the government's reading and to seek a construction that gives some content to each element of the crime set forth in the test. *The plain meaning of the words in context indicates that the reference to 'enterprise' was included to denote an entity larger than, and conceptually distinct from, any 'pattern of racketeering activity' through which the enterprise's 'affairs' might be conducted. United States v. Sutton, supra* at 266 (Emphasis added).

If "enterprise" is not distinctly defined, then it has no separate function in the statutory framework. The reference to an enterprise would become redundant and purposeless. "A straightforward prohibition against engaging in patterns of racketeering activity would have sufficed, and there would have been no need for a reference to 'enterprises' of any sort." *Ibid.*

The statutory definition of "enterprise" in 1961(4) was obviously intended to provide precisely the requisite distinction. There, various forms of legitimate enterprises are enumerated; this list is followed by a catch-all phrase "any . . . group of individuals associated in fact." Applying the principle of *ejusdem generis,* the included groups must, as well, represent an association or group which has a life or existence independent of the mere commission of the crimes making up the "pattern of racketeering activity."

The necessity of distinguishing the two concepts—the enterprise and the pattern of racketeering—is reinforced by reference to two additional subsections of the Act, 1962(a) and 1962(b). The first of these, 1962(a), prohibits the acquisition of any interest in an enterprise with income derived from racketeering; §1962(b) prohibits acquisition of any enterprise through a pattern of racketeering activity. Common sense dictates that a group of individuals associated merely by combined participation in acts of racketeering would not constitute an entity in which interest could be acquired. Hence, consistency among the subsections of 1961 is preserved only if the term of "enterprise" is defined as requiring the existence of an entity which itself has an existence beyond the criminal acts alleged—*i.e.*, a "legitimate" enterprise.

The RICO statute is generally considered to have been a carefully constructed piece of legislation, see *Ianelli v. United States,* 420 US 770, 789, (1975). The language must, therefore, be presumed to have clear and logical purposes. A common sense reading of the statute supports Petitioner's contention that "enterprise" does not encompass wholly illegitimate entities.

B.

Examination of the statute's legislative history suggests the propriety of the reading of the statute contended for by Petitioner.

Enactment of the Organized Crime Control Act of 1970 followed nearly two years of legislative consideration. A commendably concise and comprehensive outline of RICO's history was provided by Judge Merritt, in the panel opinion in *United States v. Sutton,* 605 F2d *supra* at 266-268.

As Judge Merritt there notes, both sponsors of the legislation that ultimately became the RICO statute (Senators McClellan and Hruska) described their legislative proposals as having as their purpose the protection of "legitimate businesses" from racketeer encroachment. When the Department of Justice endorsed those bills, it did so on the basis of their utility in attacking the "infiltration of legitimate business." See *e.g.*, Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess., on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2072, S. 2122 and S. 2292, at 386-388 (1969).

The Report of the Senate Judiciary Committee on the bill likewise speaks of its purpose being to control the infiltration of "legitimate organizations." Senate Comm. on the Judiciary, Report on the Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969). The floor debates as well as the "Statement of Findings and Purpose" preceding the substantive provisions of the statute, speak to the perceived evil of the use of "legitimate business" as harbors for the proceeds of ill-gotten gains, and as vehicles for the further "subversion" of the national economy.

Throughout, Congress was singularly directed toward one goal—to prohibit a special class of criminal from "operat[ing] illegitimately in legitimate channels." 116 Cong Rec. at 867 (1970. To extend prosecution, as was done in the instant case, to individuals who combine solely for the purpose of and thereafter do, in fact, commit racketeering acts, is in total derrogation of the intended purpose of RICO.

C.

Finally, this Court must, in evalutating Petitioner's contention, give weight to two principals of statutory constructions.

First, it may not be presumed, without satisfactory Congressional directive, that a federal criminal statue has as its purpose the unsurpation of law enforcement in areas traditionally within the jurisdiction of the states. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass,* 404 US 336, 349 (1971).

Absent the limitation suggested herein (that prosecution under RICO is confined to offenses involving legitimate enterprises) the balance of federal and state criminal law may be substantially altered.

> Since the crimes encompassed by 'racketeering activity' specifically cover state crimes, the federal government has a powerful tool for injecting itself into the area of state law enforcement. The government's reading of RICO renders it essentially equivalent to a traditional state conspiracy statue so long as the interstate commerce and two acts within ten-year provisions satisfied. This gives the federal government a powerful tool for usurping a significant province of state criminal jurisdiction. *United States v. Turkette,* 632 F2d *supra* at 904.

No language in the statue itself or in the legislative record suggests that Congress intended such a drastic result. Proper construction would, then, disallow broad interpretation of the meaning of "enterprise" and limit its definition to exclude wholly illegitimate enterprise.

Secondly, although of equal significance, is the rule of lenity.

As stated in *Rewis v. United States,* 401 US 808, 812 (1971) "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." This maxim is, of course, unavailing where the legislative history speaks "plainly and unmistakably" to the contrary. *United States v. Gradwell,* 243 US 476, 485 (1971). However, as the panel opinion in *United States v. Sutton,* 605 F2d *supra* at 269, noted:

> When as in this case the legislative history speaks 'plainly and unmistakably' but in support of resolving the statutes ambiguity in favor of the construction argued by defendants, the maxim applies with special force and tells us that we ought not to strain to accomodate the government's desire for broader construction.

The construction of the statute ultimately adopted by the Sixth Circuit flies in the face of any common sense reading of the statute.

The case at bar is one of which the impact of the untoward broadening the statute's application was clearly determinative of the property of Petitioner's conviction. Since there is a clear conflict between the circuits as to the question involved, because the resolution of the question is of manifest significance to the federal criminal jurisprudence, and because resolution of the question is of outcome—determinative significance in Petitioner's case, this case is an appropriate one for the grant of certiorari.

This Court will already squarely face the conflict between the circuits here raised in *United States v. Turkette,* No. 80-808. Certiorari should similarly be granted in this case, so that the court will have before it a range of factual settings and permutations against which to guage and apply the merits of the competing views as to the important question of statutory construction here at issue.

TWO ACTS WHICH CONSTITUTE PARTS OF THE SAME CRIMINAL TRANSACTION CANNOT BE CONSIDERED SEPARATE "PREDICATE ACTS" UNDER 18 USC §1961 (5), AND CANNOT, FOR THAT REASON, FORM THE "PATTERN OF RACKETEERING ACTIVITY" REQUIRED FOR CONVICTION UNDER THE RICO STATUTE.

As described above in the Statement of the Case, the Indictment charged a telephone call from Florida to Michigan seeking funds and the telegraphed money order generated thereby as two separate and distinct acts of wire fraud, and, further predicated the "pattern of racketeering" necessarily underlying the RICO counts on those two acts.[2] Assuming, *arguendo,* that the division of this singular transaction into separate offenses may be supportable for purposes of defining acts of wire fraud, 18 USC §1343, it is, nevertheless, Petitioner's contention that this incident represents a single criminal episode, and cannot be broken up into separate "acts of racketeering" sufficient to establish a "pattern" as defined by 18 USC §1961(5), a necessary element of 18 USC §1962(c) and (d). Without proper proof of such a "pattern", Petitioner's conviction on the RICO counts cannot stand.

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[2]. These were the only two "predicate act" counts which went to the jury. Petitioner was charged alternatively in the RICO counts with conducting an enterprise through collection of an unlawful debt as defined by 18 USC §1961(c). However, since the jury's verdict was a general one, neither petitioner nor this Court can be certain that it was not based upon these "predicate acts" counts. Accordingly, the question of the propriety of their submission to the jury as a potential basis for their finding of a "pattern of racketeering activity" must be faced, and is not moot. If the submission was improper, so was Petitioner's conviction.

While the term "pattern" has been variously interpreted by the lower courts, *see, United States v. Parness,* 503 F2d 430 (2d Cir., 1974), *cert denied,* 419 US 1105 (1975); *United States v. Moeller,* 402 F Supp 49 (D. Conn. 1975); *United States v. Stofsky,* 409 F Supp 609 (S.D.N.Y., 1973; *United States v. DePalma,* 461 F Supp 778 (S.D.N.Y., 1978); *United States v. Morris,* 532 F2d 436 (5th Cir., 1976); *United States v. Fineman,* 434 F Supp 189 (E.D. Penn., 1977); *United States v. Gibson,* 486 F Supp 1230 (S.D. Ohio, 1980), there appears to be, to a limited extent, a general consensus that the two predicate acts must represent different criminal episodes, and must have been committed in the conduct of the affairs of the "enterprise".

Thus, in *Stofsky,* 409 F Supp, *supra* at 614, the Court stated:

> [T]his Court therefore construes the word 'pattern' as including a requirement that the racketeering acts must have been connected with each other by some common scheme, plan or motive, so as to constitute a pattern and not simply a series of disconnected acts.

In so holding, the Court looked to the definition of "pattern" used in 18 USC §3575(e) (also included in the Organized Crime Control Act) which defines a "pattern of criminal conduct" as follows:

> . . . criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods or commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

Although holding that the issue had been authoratatively resolved by *Parness, supra,* the Court in *Moeller,* 402 F. Supp at 57 noted:

> Were the question open, I would have seriously doubted whether the word pattern as used in 1962(c) should be construed to mean two acts occurring in the same place on the same in the course of the same criminal episode. While the statutory definition makes clear that a pattern can consist of only two acts, I would have thought the common sense interpretation of the word 'pattern' implies acts occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity.

Similarly, though narrowly interpreting "pattern" to exclude a requirement of "relatedness" of one act to another, the Court in *DePalma,* 461 F. Supp *supra,* at 783 recognized that "the term 'pattern' when used in this context, applies to the *relationship of the acts to the enterprises,* and no more." (Emphasis supplied).

The legislative history described in Issue I above amply reflects the congressional purpose of the Organized Crime Control Act. Simply stated, it was the legislative intent to prevent racketeers from infiltrating and controlling legitimate business organizations through a scheme or plan predicated on illegal activity. The focus of this Act is characterized in the Senate Committee Report on the Organized Crime Control Act of 1970:

> The concept of 'pattern' is essential to the operation of the statute. One isolated 'racketeering activity' was thought insufficient to trigger the remedies provided under the proposed chapter,

> largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of Title IX is thus not sporadic activity. S. Rep. R. 91-617, 91st Cong., 1st Sess. p. 158.

Whatever definition is applied, it is readily apparent that the two alleged acts of racketeering underlying Petitioner's RICO offenses do not display a "pattern" of activity. First, the acts do not represent different criminal episodes. Secondly, the two acts were not perpetrated in the conduct of the affairs of the enterprise. The money order was wired from Michigan to Florida in response to Peter Luca's request for expense money. The use of the interstate wire facility by the "victim" James Hutton, does not represent a distinct act of racketeering, and, more importantly, does not represent an act designed to promote the affairs of the enterprise. The telephone call and responding wire represent, at best, a single predicate act of racketeering.

Thus, the Sixth Circuit Court of Appeals, in holding that the telephone call and Western Union money order represent two separate acts related to the continuing efforts of Petitioner and witness Luca to extract cash from Hutton as a part of their ongoing scheme to defraud him, obscures the issue. Together the acts present a cause and effect acquisition of funds from Hutton. The two acts cannot be separately defined as promoting the affairs of the enterprise. See Court of Appeals Opinion at pages 17-18; Appendix A, pp 35-36, *infra*. Ironically, this finding is implicit in the Court's own statement:

> That Hutton himself sent the money, and that Morelli and Luca did not, is immaterial to the question of Morelli's guilt of having by his conduct brought about that act. Court of Appeals Opinion at page 18; Appendix A, p 36 infra.

The Court's analysis fails where it simply ignores the relationship of the two acts as they interrelate, and as they relate to the "enterprise" through the definitional concept of the term "pattern".

In sum, while it is conceivable that the act of requesting money by telephone and generating, by that request a responsive telegraphic money order, could support two separate counts of wire fraud, it is inconceivable that a single, isolated criminal episode could be subdivided and construed to represent a pattern of racketeering activity which would, in turn, support a RICO conviction.

The question posed—whether a "pattern of racketeering activity" can be made out by subdividing a single criminal episode into separate parts (even separately indictable parts)—is one which is basic to the proper scope of the RICO statue. There is a clear conflict between the varying resolutions of the question in the courts below, bespeaking a need for guidance from this Court on this important question of federal criminal law. The question here presented is an appropriate complement to the questions as to the proper scope of that statue that it will decide in *United States v. Turkette*, 80-808.

Accordingly, the writ of certiorari here prayed for should issue to review the Court of Appeals' resolution of this question as well.

CONCLUSION

The instant petition presents important questions as to the proper scope, interpretation and application of the RICO staute, 18 USC §1961 *et seq.*, which have been the object of controversy and varying conclusions by the several circuits.

The decision of the Sixth Circuit Court of Appeals in the instant case, is itself in conflict with the better reasoned decisions of and in other circuits, and is contrary to the plain and proper meaning of the statute.

This Court should issue a writ of certiorari, to review the decision below, both to resolve the direct conflict between the circuits, and to furnish guidance to the bench and bar as to the proper interpretation of this important federal criminal statute in those particulars which the questions here presented implicate.

This Court's grant of certiorari, *United States v. Turkette,* No. 80-808 (January 26, 1981) suggest its recognition of the need to answer these questions. Because Issue I of this Petition is identical to the question which will be resolved in *Turkette,* and because Issue II presents a closely allied and complementary question, the Court should issue the writ of certiorari here prayed for, and order this case joined with *Turkette* for argument and submission.

At the very least, the Court should hold the instant Petition in abeyance pending its disposition of *Turkette,* and upon that disposition, consider whether either or both of the questions herein presented should or need to be further addressed.

Respectfully submitted,

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Dated:

No. 79-5031

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD MORELLI,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed February 27, 1981.

Before: WEICK, LIVELY and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. Ronald Morelli was found guilty by a jury in the United States District Court for the Eastern District of Michigan of conducting the affairs of an enterprise through a pattern of racketeering activities and through the collection of unlawful debts, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1976); of conspiring to violate the Act, 18 U.S.C. § 1962(d) (1976); and of two counts of wire fraud, 18 U.S.C. § 1343 (1976), the conviction of which was a predicate to his conviction under RICO, 18 U.S.C. § 1961(1) and (5) (1976).

Before the case was submitted to the jury, the trial court granted a judgment of acquittal of six other counts of the indictment charging Morelli with wire fraud (count 4), extortion (counts 6 through 9), and the use of wire facilities to facilitate extortion (count 10).

In acquitting Morelli on counts 4, 6, 7, 8 and 9, Senior United States District Judge Ralph M. Freeman held that while there was "substantial evidence that an enterprise existed, that its affairs affected interstate commerce and that the defendant Ronald Morelli was associated with the enterprise," the evidence connecting Morelli with the particular conduct dismissed was insubstantial. This conduct, Judge Freeman found, was not a sufficiently foreseeable result of Morelli's participation in the conspiracy to justify its use as the basis for his conviction on that count. With respect to count 10, charging wire fraud in the extortion of Charles Wicks, Judge Freeman found that there was absolutely no evidence to connect the defendant with the extortion. Judge Freeman further held that even if the language of the indictment was read to include an attempt to collect an unlawful debt, without reference to extortion, it was "clear that the attempt to collect an extention of credit is not a violation of section 1962."[1]

I.

Before addressing the specific alleged bases for reversal, it is necessary to describe in some detail the nature of the enterprise in which Morelli and his associates were involved.[2] The general purpose of the enterprise was the development

[1] Judge Freeman's ruling on the defendant's motion to dismiss, which addresses each count of the indictment, reflects the great care with which he considered and disposed of each claim. *See* Appendix, vol. 5, at 1021-41.

[2] Named as co-defendants with Morelli in the RICO and conspiracy counts of the indictment were Robert LaPuma, also known as "Bob" and "Big Bob," Thomas Misko, "Tom" or "Tommy," Augustino Giordano, or "Augie," Curtis Turbyfill, Joe Melfi, John Groff, and Mike Groff. Also named in the conspiracy count was Ronald Jones. Morelli originally went to trial on May 1, 1978, with the other defendants. However, Judge Freeman declared a mistrial as to the case against him when his defense counsel had to undergo emergency surgery. He was therafter tried alone by another jury empanelled August 24, 1978. On conviction, he was sentenced to 15 years imprisonment each on the RICO and conspiracy counts and to five years on each of the two predicate crimes, the terms of the sentences of each count to run concurrently. He was also fined $10,000.

of continuing schemes (or "scams") to obtain money from unwitting but vulnerable victims.[3] A careful examination of the trial record generally confirms defense counsels' claim that Morelli's contact with the individual victims of individual scams was limited. This factor, clearly, persuaded the district judge to acquit Morelli on five of the counts charging predicate crimes. Nonetheless, as the trial judge observed, there was ample evidence of Morelli's full involvement in the enterprise and in the conspiracy itself. Morelli acted as business manager of the enterprise, dealing purposely through other members of the enterprise. As will be described later, Morelli surfaced most visibly in the Hutton scam which formed the basis for his conviction on the two wire fraud counts.

In operating the enterprise, each scheme or "scam" was carefully crafted by the enterprisers to appeal to the victim's particular weakness, whether for gambling, sex, or dishonest profit. It was the government's theory that Morelli was the *de facto* head of the enterprise, coordinating its activities, passing judgment upon various schemes proposed by the other members, and acting as a reliable treasurer. The principal front man, and prime witness for the government, was Peter Luca.

Luca had an extensive criminal record, including possession of counterfeit notes, illegal gambling, extortion, check fraud, and procuring for gross indecency. For over twenty years he had derived his income from running gambling games and providing women for prostitution. Luca's specialty was gambling. He acted often as dealer or banker in card games involving marked cards, loaded dice, hand signals and other

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[3] While the term "scam" finds no dictionary definition, counsel for the parties have throughout the appeal employed the term either as a noun or a verb, to describe a specific unlawful scheme. Apparently the term is enjoying some current popularity in use, *e.g.*, "Abscam," meaning, I suppose, an Arab scam. To devotees of Robert Redford movies, the term is probably synonymous in meaning with "sting."

devices to insure that the elements of chance did not interfere unduly with the profitability of the business. Luca's decision to cooperate as a government witness came not so much from any resolution to reform his life as from distaste for a ten-year prison term earlier imposed upon him for extortion. Counsel for the defendant persuasively argue that Luca's credibility was substantially affected by his past unsavory record and by his present desire to escape prison life by testifying to anything which he might think would advance the day of his freedom. As counsel point out, he was successful. He did, indeed, obtain a release after serving only one and one-half years of his ten-year sentence. All the same, the jury rather clearly believed most of his testimony, no doubt because it was largely corroborated by other witnesses. We are, therefore, bound to view the evidence, including Luca's testimony, in the light most favorable to the government.

The proof at trial related to five scams, the victims of which were Ed Vervane, Jr., Charles Wicks, Kenneth Pichette, Gordon Glaser, and finally, James Hutton. A summary of the testimony concerning each scam is necessary to understand the pattern of the overall operation.

Ed Vervane, Jr. had a wealthy, indulgent father. Young Vervane had long been a friend of Luca. Through Luca, Vervane became acquainted with co-defendant Robert LaPuma. It was LaPuma who thereafter devised a scheme to involve Vervane in a rigged game of "liars poker." Accordingly LaPuma, Luca and Morelli devised a plan. Luca was to bring Vervane to meet Morelli and LaPuma at a restaurant on the pretext that they would all go to a party where they could meet some girls. Once there, Vervane was to be enticed into a game of "liars poker" with Morelli, Luca and LaPuma. The game, rigged by signals, was to be for a "dollar a hand." Only when Vervane had lost "$16" was he informed by Morelli that a dollar, in the terminology of the

players in this exclusive group, meant $100 and that he was therefore in their debt to the tune of $1600. Proceeding with the scheme, Luca and LaPuma then talked the gullible Vervane into trying to recoup his losses. Predictably the debt grew to $3,000. The enterprisers, already familiar with Vervane's father, also knew that the father would instinctively protect the son, especially if the money was owed to members of the mob or the Mafia. Relying upon this, they proceeded to have Vervane roughed up by LaPuma and to threaten Vervane's father, resulting in the ultimate collection of the debt. Morelli gave Luca $600 as his share.

Gambling formed the basis for the scam which involved Charles Wicks in 1972. A real estate broker in Warren, Ohio, Wicks was lured into a card game called "stacks," operated by Luca with the aid of co-defendants LaPuma, Curtis Turbyfill, John Groff and Mike Groff.[4]

The Wicks scam was a refinement of the Vervane scam. LaPuma, who apparently was seen by his cohorts to possess the proper physical appearance and reputation to qualify him as a member of the "Mafia," was chosen to win the game while Wicks and the other conspirators were to be the losers. The game was rigged by the use of marked cards and hand signals. Wicks lost $10,000. No collection, of course, was made from the other apparent losers. Wicks only had $500 on him at the time. It took six to eight months for him to pay off the remainder of the debt, accomplished in part by a deed to certain property, by cash, and by check. Still gullible, Wicks was enticed into another game at a race track in West Virginia. He lost $1,200. Morelli became concerned when LaPuma was only able to collect $4,000 or $5,000 of the debt and Wicks appeared to be stalling on the

[4] The appeals of John M. Groff and Curtis Turbyfill from their conviction in the earlier trial are the subject of a separate appeal in this court and an opinion affirming their individual convictions has been entered concurrently with this decision.

payment of the rest of it. He thereafter pressed Luca and LaPuma to pursue collection, and suggested that they persuade Wicks to accompany them to Las Vegas, where they could at least get $5,000 through the use of his casino credit card. Luca or LaPuma transmitted the payments they received from Wicks, and Morelli who thereafter divided the money gave them their share. As noted earlier, Judge Freeman dismissed the count of extortion against Morelli because the government was unable to sufficiently connect Morelli with the extortionate efforts which it claimed had been made to obtain payment of this gambling debt.

In late 1971 or early 1972, Morelli came up with a scheme to involve Kenneth Pichette, a jockey, in a rigged card game with the expectation that when he was unable to make good on his anticipated losses, Pichette could be persuaded to fix a horse race. Pichette predictably lost $3,000, but Morelli concluded that the loss was not sufficiently large to persuade Pichette to fix a race. He therefore told Luca and LaPuma to collect the money instead. Pichette finally managed to pay off between $1,500 and $1,800 of the debt. Luca collected it and passed it on to LaPuma or Morelli, who thereafter divided the profits.

Gordon Glaser, a young man from Shaker Heights, Ohio, was lured into a scam by the wiles of Luca's girlfriend, one Lynn Offerdahl, whom he met, with Luca, at a race track at Windsor, Ontario. Though Lynn was Luca's girlfriend, Luca was not averse to sharing Lynn's favors with Glaser for a fee. Thereafter Luca, LaPuma and Morelli discussed the possibility of introducing the gullible Glaser to their customary rigged games. After four games, which took place over a one-year period at Luca's residence, Glaser lost between $10,000 and $14,000. In each case, Glaser could only pay a small part of the loss at the time incurred, and his credit was accepted. His later payments, when collected, were given to Morelli who therafter divided the profits with the other

participants. Typically, Morelli does not appear to have actually participated in the games at Luca's residence, although his role as control man and banker was clearly established.

The crowning achievement of the enterprise was the scam involving James Hutton, a wealthy building contractor and insurance man from Detroit. Luca had known Hutton since 1969 and had sold him pornographic films and provided women for Hutton's insurance business. Early in 1970, Luca, Morelli and LaPuma discussed trying to get Hutton involved in the traditional "game of chance." In two efforts, Luca failed. If Hutton remained uninterested in gambling, he was not, however, immune from the suggestion that he might reap huge profits from various schemes which Luca, LaPuma and Morelli concocted as part of their program to part Hutton from his wealth.

At Morelli's suggestion, Luca persuaded Hutton that he and LaPuma had an opportunity to obtain a trailer laden with stolen J & B Scotch whiskey which could be resold to the Mafia for between $100,000 and $200,000 and that $20,000 was needed to finance the operation. Hutton, interested, asked Luca to introduce him to Thomas Misko, who was purported to be an expert in the field of stolen merchandise and who supposedly was running the operation. As a result of that meeting, Hutton put up between $8,000 and $9,000 with the belief that the rest of the $20,000 was being invested by Misko, LaPuma and Luca. Once more the money was turned over to Morelli who in turn divided it among the participants in the scheme. Needless to say, Hutton never saw any part of his investment again.

Thereafter between 1972 and 1974, Hutton, ever gullible and ever anxious to recoup his growing losses by involvement in further, non-existent illegal schemes, was bilked of approximately $200,000. Those schemes included the selling of stolen grain to a race horse owner in Florida, dealing in

stolen snowmobiles, cigarettes and television sets, stolen women's apparel, appliances, and in narcotic pills. Each time when the particular scheme failed to produce any return, Hutton was put off by the explanation that the police had intervened to defeat the project. The enterprising conspirators even went so far as to stage a fake arrest of LaPuma for Hutton's benefit, at Morelli's direction.

While it appears incredible by hindsight, the conspirators even took advantage of the supposed failure of the concocted schemes to obtain further money from Hutton. Thus, he yielded up an additional $5,000 to pay bail money for LaPuma as a result of his fake arrest, and another $6,000 to pay what was represented as a mob contact in Cleveland to expedite the sale of the narcotic pills. He also was induced to part with $5,000 or $6,000 to pay co-defendant Turbyfill to leave town, upon the representation that the latter was an informer. Another $500 was extracted on the pretext that it was needed to bail out a driver who was arrested while driving one of the trucks containing stolen merchandise. Another $1,500 was paid on the representation that it was required to hire a bulldozer to free a truck which had been bogged down in soft dirt. In each case, the money obtained from Hutton was given to Morelli for division among the various participants in the scam.

All of this time, Morelli himself remained in the background. Late in 1972, however, Hutton asked to see Morelli to find out why all of his investments had gone bad and to obtain some sort of a guarantee that eventualy he would recover his investment. As Luca put it:

> A Well, after all the screaming and the yelling, and the scamming on him and scheming, he [Hutton] was frustrated. He said he wanted to meet the main man, he was tired of being screwed around, that why was the Mafia letting all these things get away and go down and how are we allowed to let

him get away with it if we were connected with the mob, and he wanted to meet personally with Mr. Morelli, and he was tired of being screwed around and he wanted a guarantee now that his money was going to come back. In other words, he finally wanted to complain to the main people.

Q What had you told Mr. Hutton about Mr. Morelli?

A We told him he was our main man in front of the Giacalones and that he represented the outfit and that he was our boss.

When Morelli was told that Hutton was becoming a problem, that he might go to the law or quit giving money, he decided to meet with him. According to Luca, Morelli said: "O.k., it's time to sit him down. Bring him to me. Try to hit him for one big cash load, one big total amount, and if we get it, we'll just end it and wipe him out and we don't want to see him no more." At this meeting, Morelli discussed a new venture with Hutton wherein Morelli proposed to send Luca and LaPuma to Mexico to bring back some narcotics. The proceeds from the sale of these narcotics, Hutton was told, would be more than sufficient to recoup all of his losses and generate a profit for him of $100,000. Hutton, however, would have to put up $35,000 to $50,000 to finance the operation, with Morelli supposedly putting up a like amount. By this time Hutton was beginning to shed his naiveté; this time he decided to think about it and let the conspirators know his decision later.

About the same time, Morelli and his entourage were planning a vacation in Florida, a trip which Luca told Hutton was necessary to transact the narcotics deal. Hoping to wrap up this deal before they left, Morelli ordered another meeting with Hutton to again try to convince him to invest in this venture. Luca recalled the conversation at this second meeting as follows:

> Well, Mr. Hutton came in and Mr. Morelli said, "Sit down" and "What is your decision? What are you going to do? We're getting ready to go. Everything is all set." Mr. Hutton said, "I'm having problems and I don't know if I can get that much cash up right now. I'm not sure yet." Mr. Morelli said, "Well, if you want to get your hundred thousand dollars back, here's your chance at one time, so give Pete a decision right away or it's going to be too late. You've only got another week or two to make your decision." Mr. Hutton said he might need a little more time and he didn't know if he can go for it or if he can get that kind of cash at this time. That was the end of the conversation.

The testimony of the victim, Hutton, generaly corroborates that of Luca. He quite freely acknowledged his own culpability. Cross-examined by counsel for Morelli, Hutton explained the technique which ever more deeply involved him in financial loss:

> A They would always come back with another story that they were going to get my money back, they were going to have something else and they guaranteed me I would have my money back and they would get me involved in another one.
> Q In other words, the next story was better than the last?
> A Yes.
> Q Weren't you bothered by the fact that this was stolen stuff you were buying?
> A Yes, I was.
> Q But you didn't stop?
> A I was just trying to get my money back.

Hutton, in a minor divergence from Luca's testimony, remembered meeting with Morelli on a total of four occasions to discuss his losses. Three of these meetings, according to Hutton, were rather brief. The narcotics deal was suggested during the fourth meeting. Hutton testified:

Q Did you speak with Mr. Morelli at this meeting?
A Yes.
Q Can you indicate, please, what you said to Mr. Morelli and what his responses were?
A He said they had another package put together and that I would have to come up with $30,000 and that they would – they were going to have Bob LaPuma and Pete Luca go down to the islands and get a load.
Q Did he indicate what "get a load" was?
A It was referred to as dope. They didn't say dope but that was the impression that they gave me.
Q What was your response?
A I told him I was broke and couldn't come up with $30,000.
Q Did Mr. Luca or Mr. Misko or Mr. LaPuma say anything about that at that third meeting?
A Well, they kept pushing me to try to see if I would come up with this money.

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Q (By Ms. Simms, continuing): When you indicated to Mr. Morelli that you were broke and didn't have the money, what was his response, if any, to that?
A He got very irritable with Bob LaPuma and Pete Luca and said they had no business arranging that meeting, knowing that I didn't have the money. And the conversation did come up at that time that the only way I could get the money was to put a mortgage on my home, and right away Morelli wanted to know how long that would take, and I said probably a month. And this is where he was very upset and he went stomping out.

What happened thereafter in the development of this narcotics scam forms the background for the four counts of which Morelli was subsequently convicted: counts three and five, the wire fraud charges, count one, the RICO violation, and count two, the conspiracy to commit a RICO

violation. Since Hutton still had not agreed to put up the money to finance the narcotics deal by the time Morelli left for his vacation in Florida, he decided to have Hutton invited to join him there. Luca testified:

> I discussed with Mr. Morelli, they told me where they were going to be, said they would be at the Newport, come on down there, that we would vacation, and while we were vacationing we would call Mr. Hutton. And I was told that I should call him and try to get him to come down there to show him I was down there and try to have him and his wife come down there and we would take him out on maybe a Teamsters yacht and party him and his wife, and influence him down there to maybe still get this $35,000 to put up for the drugs.

Thereafter Luca testified to the telephone call which formed the basis for count 5:

> Q What did you say to him [Hutton]?
>
> A Told him I was at the Newport, I was standing there with Mr. Morelli, that he had made a decision or would him and his wife want to come down, that there was a lot of influential people around there and that it looks pretty good on that drug scene to come down, and did he want to come down, him and his wife, right now. He said no, he didn't know if he could make it. I said, "Well, you want to talk to Mr. Morelli?" He said, "Yes," and I handed the phone to Mr. Morelli.
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> • • •
>
> Q (By Ms. Simms): What did you hear on your end of the phone that Mr. Morelli said?
>
> A "Jim, have you made a decision? Come on down. . . . We're partying, and also get down or your're going to miss the boat on getting your money back in a hurry. So are you going to come down?" That's what I heard.

Q Was that the end of the conversation with Mr. Hutton and [sic] Mr. Hutton?
A Yes, he hung the phone up.
Q Did you ever receive any money in Miami from Mr. Hutton?
A Yes, I did.
Q Approximately how much money, if you recall?
A I don't know. Couple hundred dollars or so.
Q Do you remember approximately when that was?
A Well, at the same time that I was down there in Miami.
Q Mr. Luca, would you please look at what has been marked as Government's proposed exhibit 26, and without telling the jury what that is . . . does that refresh your recollection at all as to the dates you were actually in Miami?
A Yes.
Q Could you give us what date that refreshes your recollection as to when you were in Miami?
A February of 1973.
Q Was that during the time that you also received some money from Mr. Hutton?
A Yes.
Q Is that also the time during which Mr. Morelli spoke with Mr. Hutton on the phone?
A Yes, it was.

• • •

Q (By Ms. Simms, continuing): What was the couple of hundred for?
A Mr. Morelli, when he hung up the phone on Mr. Hutton and he said he wasn't going to come down or come with the thirty-five thousand, Mr. Morelli suggested I call him back and tell him at least mail some money down for expenses, give him a story and get some money down here for expenses. And I called Mr. Hutton back and laid a story on him.
Q What was the story you laid on him?
A I told him that if I stuck around, something like I was running out of money and I had a chance to

get a little piece of the action but I had no money, or something I laid on him, and I said, "I'm going to need five hundred or a thousand dollars. I says "Why don't you wire it down to me?" He wired me, I think, only a couple of hundred.

Q Is that the only money you received from Mr. Hutton while you were in Miami?

A I don't know. I think I got two wiregrams. I believe there was two. I'm not sure.

Q Do you recall approximately when the second one was?

A They were pretty close to each other. Maybe a week, two weeks apart. I'm not positive.

Q Do you remember what the second one was for?

A No. I know I laid another story on him. I don't know exactly what story I told him but it was a bullshit story.

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Q (By Ms. Simms): How long were you actually in Miami, Mr. Luca?

A Well, around two or three weeks.

• • •

Q (By Ms. Simms): Mr. Luca, you said Mr. Hutton wired you money twice?

A I believe so.

Q Where did you pick the money up from?

A The Western Union wiregram, Western Union telegram.

Q Do you now recall who the actual wire money order was payable to?

A Who it was made out to?

Q Yes.

A To me.

Q What did you do with the money once you got it?

A Picked it up and went back to the Newport motel and told Ronnie and the guys that were sitting there we had some money, he didn't send me that much but we had some money. Mr. Morelli said, "We'll just spend it to pick up the tab."

Again, on the matter of the telephone call(s) from Florida to Michigan, Hutton's testimony differs just slightly from Luca's. Hutton remembered the conversations with Luca about traveling expenses and with Morelli about the narcotics deal as occurring during the same phone call. Hutton's testimony did confirm, however, that he sent a wire money order for $200 to Luca in Miami, and that a telephone conversation with Luca and Morelli preceded the sending of this money. Hutton testified:

Q What circumstances resulted in your sending that money order?
A Pete Luca was in Florida, and he called me at home and needed some money for traveling expenses.
Q What was your response?
A At first I wasn't going to give it to him. I told him that was his problem.
Q And what did he respond to that?
A Well, they kept talking there and finally I agreed that I would send it down the first of the week.
Q Did you talk to anyone else other than Luca in Miami?
A Yes.
Q Who was that?
A At the same telephone conversation Morelli got on the phone and assured me that everything was all right, that I was going to get my money back and to go along with these guys, meaning Misko, Luca and LaPuma.
Q Did you recognize that as being the voice of Mr. Morelli?
A Yes.

Hutton's testimony was supported by government exhibit 44A, a Western Union telegraphic money order receipt for $200 and a $7.90 service charge.

II.

In his brief on appeal, Morelli outlines four claims of error as grounds for reversal:

I. A CALL TO MICHIGAN REQUESTING EXPENSE MONEY FOR A FLORIDA VACATION AND THE RESPONSE IN THE FORM OF A $200 WESTERN UNION MONEY ORDER WHICH WAS USED FOR VACATION EXPENSE MONEY WERE NOT SUFFICIENTLY RELATED TO ANY SCHEME OR SCAM TO BRING THE ACTIONS WITHIN THE WIRE FRAUD STATUTE.

II. THE REQUEST FOR FUNDS FROM FLORIDA AND THE RESPONDING WESTERN UNION MONEY ORDER DID NOT ESTABLISH THAT DEFENDANT WAS INVOLVED IN A PATTERN OF RACKETEERING ACTIVITY AS THAT TERM IS DEFINED IN 18 U.S.C. § 1961(5).

III. DEFENDANT MAY NOT BE CONVICTED ON RICO CHARGES WHERE THE GOVERNMENT FAILED TO ESTABLISH THE NECESSARY ELEMENTS FOR THE TWO PREDICATE WIRE FRAUD COUNTS AND THE TWO WIRE FRAUD COUNTS CONSISTING OF A REQUEST AND RESPONSE FAIL TO ESTABLISH A PATTERN UNDER TITLE 18 U.S.C. § 1961(5).

IV. THE RICO STATUTE IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANT MORELLI.[5]

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[5] There also appears to be some inconsistency in the dates set forth in the indictment. The telephone conversations were alleged to have occurred on or about February 7, and the transmittal of money occurred or was shown to have occurred on or about February 6, whereas the proof at trial unequivocally showed that the telephone conversations preceded the transmittal of the money. Morelli did not make this an issue on appeal, but the court has considered it *sua sponte*. This apparent inconsistency was not fatally defective to the indictment. In each instance, the language of the indictment recited that the particular activity was "on or about" the date specified. This type of pleading has long been practiced because, unless a particular date

We have described in some detail the nature of the enterprise in which Morelli and his associates were involved because this description, more than any legal argument, fully demonstrates Morelli's deep involvement in the enterprise as a whole, and his guilt of the two predicate counts of wire fraud. Further, it demonstrates the connection of the telephone conversation and Hutton's subsequent act of wiring the money to the overall scam involving Hutton.

There seems to be some disagreement as to the number of telephone calls made, Luca remembering two and Hutton remembering only one coming to him from Morelli and Luca in Miami. Several years, of course, had elapsed between the dates of the occurrences in question and the testimony of the witnesses and it is indeed not at all surprising that some discrepancy should occur. This, of course, bore upon the credibility of the witnesses, but the discrepancy itself cannot be viewed as fatal in the context of this case. The actual sequence of events, by the testimony of the witnesses, was altogether clear, whatever the dates. There was ample evidence for the jury to have found beyond a reasonable doubt that, though there may have been some confusion in the actual dates, there was never any reasonable doubt that the telephone conversation and the mailing of the money did, in fact, occur and that the money was mailed as a result of the telephone conversation. There is likewise no showing of any surprise or any other prejudice to the defendant in the presentation of his defense.

Two separate acts were shown. The evidence clearly shows that they were related to the continuing efforts of Morelli and Luca to extract further cash from Hutton as part of their

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is made material by the statute creating the offense, the statute of limitations, or any evident prejudice that would come to the defendant by the lack of the actual date, the exact date upon which the offense was committed is not crucial. *See Ledbetter* v. *United States*, 170 U.S. 606, 612 (1898); *United States* v. *Antonelli*, 439 F.2d 1068 (1st Cir. 1971).

ongoing scheme to defraud him. That they achieved only limited results and that they applied the funds to their own pleasure does not detract from the fact that the purpose of the call was to advance their overall fraudulent scheme, and to retain Hutton's interest in getting his money back by going along with the request for further money. In short, the evidence was altogether ample, that both the telephone call from Morelli and Luca to Hutton and the act of wiring the money were two separate activities which were a part of the pattern of racketeering activity as that term is defined in 18 U.S.C. § 1961(5) (1976). That Hutton himself sent the money, and that Morelli and Luca did not, is immaterial to the question of Morelli's guilt of having by his conduct brought about that act. *United States* v. *Conte*, 349 F.2d 304 (6th Cir.), *cert. denied*, 382 U.S. 926 (1965).

III.

As indicated in section II, Morelli contends that the RICO statute is unconstitutionally vague as applied to his conduct in this case. At the same time, Morelli's counsel acknowledge that the RICO statute itself has survived various void-for-vagueness challenges. *See United States* v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States* v. *Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States* v. *Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied sub nom. Grancich* v. *United States*, 423 U.S. 1050 (1976); *United States* v. *Thevis*, 474 F.Supp. 134 (N.D. Ga. 1979) (as applied); *United States* v. *Chovanec*, 467 F.Supp. 41 (S.D.N.Y. 1979); *United States* v. *Stofsky*, 409 F.Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

In his brief, Morelli's counsel employ Luca's testimony to describe Morelli's role:

> He was our man. He was the one that if we ever had to use a name, for any influence or any problem supposedly, if anybody gets uptight like Mr. Hutton and we said we represented the Mafia and they wanted to check us out, we could say, "Check with Mr. Morelli or the Giacalones," and we could use their names to get that influence, and that's the only reason we could get the money, because otherwise if we couldn't use their names, we wouldn't have the reputation they had.

As if Morelli were simply to serve as a vague background "enforcer" who himself never participated, his counsel now seek to claim that the statute would be vague as to him because the government never showed that he in fact ever participated in the conduct of the enterprise. Morelli was, however, found guilty of two predicate counts of wire fraud that were part of a pattern of racketeering activity. It is true that, perhaps from an abundance of caution, Judge Freeman dismissed the substantive extortion counts because in his view the government lacked probative evidence showing that Morelli knowingly allowed his name and supposed Mafia connections to be used as a means to coerce payment of the various debts. This ruling did not, however, dismiss the conspiracy count. Therefore, the testimony of Luca concerning the pattern of activity engaged in by the co-conspirators during the course of the conspiracy of which Morelli was a controlling member was in our judgment altogether admissible. This evidence clearly showed that the collection of an illegal debt was also a part of the enterprise.

IV.

Morelli's claim that he was denied due process in that the RICO charge relating to the collection of an illegal debt

resulting from the Vervane game was filed so long after the incident that he was unable to properly prepare his defense is without merit. In *United States* v. *Lovasco*, 431 U.S. 783 (1977), the Supreme Court held that in cases alleging improper pre-indictment delay, the reasons for the delay must be examined as well as any prejudice to the defendant. Here, Morelli makes an assertion of prejudice without presenting any facts that would support this claim. Neither does Morelli attribute any improper motives to the government in its delay in bringing this charge. Given the relatively successful nature of the parties' activities over a long period of time, it is not unlikely that the government lacked probable cause to bring the charge prior to the time it did so. Morelli should not now be allowed to benefit from any delay caused by the secrecy in which he operated.

We also find no merit in Morelli's claim that he was subject to cruel and unusual punishment in violation of the Eighth Amendment because he was sentenced to fifteen years for "obstensibly [sic] the same conduct" as that proscribed by the two wire fraud violations for which he received five years each. Morelli's reliance on *Downey* v. *Perini*, 518 F.2d 1288 (6th Cir.), *vacated and remanded*, 423 U.S. 993 (1975), as authority for his claim is altogether inappropriate. Congress may constitutionally make the commission of two crimes within a specified period of time and within the course of a particular type of enterprise an independent criminal offense punishable more severly than simply twice the penalty for each constituent offense. *United States* v. *Field*, 432 F.Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).[1]

Morelli could have been sentenced to a total of ten years' imprisonment on the two wire fraud counts themselves, which involved only the scam on Hutton. In this light, the concurrent sentences here can in no way be construed as inappropriate and excessive for a continuing series of fraudulent activi-

ties engaged in over a period of several years in which Morelli was a high level figure.

Although not raised by the appellant, the government in defensive anticipation urges that RICO is not inapplicable under the facts in this case because it failed to allege the existence of a legitimate enterprise. This apprehension was clearly prompted by the original panel decision to that effect in *United States* v. *Sutton*, 605 F.2d 260 (6th Cir. 1980). That decision, of course, has since been vacated and superseded by the *en banc* decision of our circuit in *United States* v. *Sutton*, — F.2d — (6th Cir. 1980), holding that there is no statutory requirement under RICO that the enterprise referred to in the Act be legitimate.

Affirmed.

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No. 80-1748

In the Supreme Court of the United States

OCTOBER TERM, 1980

RONALD MORELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends (1) that the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, "does not authorize the prosecution of individuals for combining together to commit criminal acts where the association is solely for the purpose of engaging in that activity and not related, in any fashion, to the conduct of a legitimate business or organization" (Pet. 6), and (2) that the predicate acts of racketeering did not constitute a "pattern of racketeering activity" under RICO.

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity and the collection of unlawful debts, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and two counts of wire

fraud, in violation of 18 U.S.C. 1343.[1] Petitioner was sentenced to concurrent terms of 15 years' imprisonment on each of the racketeering counts and five years' imprisonment on each of the wire-fraud counts, and was fined $10,000 on the RICO conspiracy count. The court of appeals affirmed (Pet. App. 19-39).

The evidence at trial is set forth in detail in the opinion of the court of appeals (Pet. App. 20-33). In brief, "there was ample evidence of [petitioner's] full involvement in the enterprise and in the conspiracy itself" (*id.* at 21). Petitioner "was the *de facto* head of the enterprise, coordinating its activities, passing judgment upon various schemes proposed by the other members, and acting as a reliable treasurer" (*ibid.*). Petitioner also devised several of the plans or schemes employed by the enterprise (*id.* at 22-27). "The general purpose of the enterprise was the development of continuing schemes (or 'scams') to obtain money from unwitting but vulnerable victims. * * * In operating the enterprise, each scheme or 'scam' was carefully crafted by the enterprisers to appeal to the victim's particular weakness, whether for gambling, sex, or dishonest profit" (*id.* at 20-21).

Insofar as relevant here, the government's evidence focused primarily on two incidents concerning petitioner. In one instance, petitioner "devised a plan" (Pet. App. 22) to involve Ed Vervane, Jr., in a rigged card game. Vervane eventually loss $3000. In order to collect the debt, the

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[1] Petitioner was also charged in six other counts involving wire fraud, extortion, and the use of wire facilities to facilitate extortion (Pet. App. 19). These counts were dismissed by the district court, "perhaps from an abundance of caution" (*id.* at 37).

participants in the enterprise thereafter roughed up Vervane and threatened his father. As a result, the debt was ultimately paid (*id.* at 22-23).[2]

In the second incident, the enterprise unsuccessfully sought to get James Hutton into a similar rigged card game. However, it succeeded in persuading Hutton to participate in a fictitious scheme to make money from various illegal activities. Hutton lost approximately $200,000 that he put up on several occasions to finance the activities (Pet. App. 25). In an attemt to obtain one last " 'big cash load' " from Hutton (*id* at 27), petitioner proposed a new narcotics venture that would enable Hutton to recoup his losses and gain a profit of $100,000. Hutton hesitated to advance the $35,000-$50,000 requested by petitioner. While subsequently in Florida on vacation, petitioner and other participants in the enterprise spoke by telephone with Hutton in Michigan to convince him to invest in the venture. Although he declined to do so, Hutton did telegraph $200 in expense money to Florida (*id.* at 25-33). These transactions formed the basis of petitioner's conviction on the wire-fraud counts.

2.a. Petitioner principally argues (Pet. 6-12) that "a wholly illegitimate group which has no existence or purpose other than the commission of the acts which constitute the 'pattern of racketeering' * * * is not an 'enterprise' within the meaning of [RICO]" (*id.* at 6).[3] The question whether a group of individuals associated in fact to commit unlawful acts for profit can constitute an "enterprise" under RICO is currently before this Court in *United States* v. *Turkette*,

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[2]This debt was illegal under the law of the state where the card game and the collection efforts took place. Other instances of collecting illegal gambling debts were also demonstrated by the government's evidence.

[3]We note that petitioner did not raise this issue in the court of appeals (see Pet. App. 39).

No. 80-808 (argued Apr. 27, 1981). Accordingly, consideration of petitioner's contention should be deferred pending the Court's decision in *Turkette*.

b. Petitioner also argues (Pet. 13-17) that the two predicate acts of wire fraud do not constitute a "pattern of racketeering activity" because they arose in "a single criminal episode" (*id.* at 13). While not contesting that "separate offenses may be supportable for purposes of defining acts of wire fraud" (*ibid.*), he asserts that RICO requires "that the two predicate acts must represent different criminal episodes" (*id.* at 14).

This contention does not warrant further review. It rests on the premise that the $200 Hutton wired to Florida occurred in response to a single telephone conversation that petitioner and his confederates had with Hutton (see Pet. 5, 16). However, as the court of appeals correctly observed (Pet. App. 31, 33, 35), the government's evidence was sufficient to show that two telephone calls were made from Florida to Michigan and that Hutton sent the money as a result of the second one. To the extent there may have been a discrepancy in the testimony on this point, it presented only a question of credibility for the jury to resolve. Viewing "*all of the evidence* * * *" in the light most favorable to the prosecution," it is clear that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); see also *id.* at 326.

Moreover, apart from the pattern of racketeering activity, petitioner was charged with conducting the affairs of the enterprise through the collection of unlawful debts. The unchallenged evidence in this regard is fully adequate to sustain his convictions.

Finally, contrary to petitioner's assertion, RICO does not require that the predicate acts of racketeering take place in different criminal episodes. Rather, the statute provides

only that there be a "pattern of racketeering activity" through which the affairs of the enterprise are conducted. "While there may indeed have been a single scheme * * * it turned out that several acts of racketeering were contemplated to achieve that objective. * * * [We find] no support for the argument that RICO 'require[s] a showing of separate and unrelated schemes, as a precondition for finding two indictable "acts" under [the mail-fraud statute] that would constitute a "pattern of racketeering activity" under [RICO].' " *United States* v. *Starnes*, Nos. 80-1437, 80-1438 (7th Cir. Mar. 20, 1981), slip op. 7, quoting *United States* v. *Weatherspoon*, 581 F. 2d 595, 601 n.2 (7th Cir. 1978). As indicated in the cases cited by petitioner (Pet. 14-15), RICO is satisfied if the acts constituting the pattern of racketeering are related to the affairs of the enterprise. See also, *e.g.*, *United States* v. *Bright*, 630 F. 2d 804, 830 n.47 (5th Cir. 1980); *United States* v. *Anderson*, 626 F. 2d 1358, 1367 (8th Cir. 1980), cert. denied, No. 80-766 (Feb. 23, 1981); *United States* v. *Weisman*, 624 F. 2d 1118, 1122 (2d Cir. 1980), cert. denied, No. 80-62 (Oct. 6, 1980); *United States* v. *Elliott*, 571 F. 2d 880, 899 n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978).[4]

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[4]At all events, petitioner's conviction on the RICO conspiracy count is unaffected by this argument, since a conspiracy can exist regardless of the commission of predicate offenses. Because petitioner's sentence on the substantive RICO count is concurrent with his sentence on the conspiracy count, it is unnecessary for the Court to consider the validity of his substantive conviction. See, *e.g.*, *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *United States* v. *Barnes*, 412 U.S. 837, 848 & n.16 (1973).

It is therefore respectfully submitted that the petition should be held pending decision in *United States* v. *Turkette*, *supra*, and that the first question presented should be disposed of in light of that decision. In all other respects, the petition should be denied.

WADE H. MCCREE, JR.
Solicitor General

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